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No. 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

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November 7, 1958

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I. AS TO THE ALLEGED VIOLATION OF THE STATUTE:

We submit that, even if we assume that there is a valid market consisting only of championship boxing contests, the plaintiff's brief has not answered our contention that no violation of the antitrust laws has been shown. Below we comment on certain matters in the plaintiff's brief.

The Tournament of Champions (T. of C.) had financially deteriorated at the time of the alleged combination. Its president had resigned in January, 1949 (R. 188). It offered no competition to any of the defendants. While, as plaintiff states, payment of $100,000 to T. of C. was made by the Garden (Pl. Br. 12) no mention was made of the fact that T. of C. had $50,000 in cash and other valuable assets.

The payment to Jacobs by the Garden in return for his non-interference and non-use of his name and that of Twentieth Century Sporting Club is a normal provision which does not alter the fact that his physical condition prevented him from being an active competitor.

Plaintiff's brief in effect concedes that there was no competition between Messrs. Norris and Wirtz and the Garden (or Jacobs) prior to the time of the formation of the alleged conspiracy (see Pl. Br. 9).

The plaintiff's brief in several places (pp. 7, 13, 30) infers monopoly arising from control of stadia. The plaintiff does not make it clear that there were many other stadia in New York and Chicago and elsewhere which were available for championship boxing and under no control by any of the defendants, and that at the time of trial and judgment the defendants controlled only two of scores of suitable stadia in the country (D. Ex. K, R. 272-274).

The plaintiff's brief says at page 20 that the "power" of the defendants flows from "elimination of *all* existing competition". Of course, no such elimination has occurred. The record shows that there were competitors during all periods of the alleged conspiracy, that there was increased competition at the end of the period covered by the complaint, that there was still more competition at the time of the trial, more at the time of the decree and still more today. It follows that no monopoly can be assumed on the basis of such claimed but non-existent "power".

The principal addition to the Court's findings of fact which plaintiff's brief urges is that the defendants had monopoly power to fix the price to the public for admission to championship fights and that they had monopoly power to fix the price at which television rights would be sold to sponsors (Pl. Br. 31-32).

There is no word in the record to sustain either claim, and this belated attempt to inject *per se* violations of the antitrust laws into the case convincingly reveals plaintiff's weak position.

Obviously, the price of admission to their own prizefight lies in the hands of the promoter, the managers and the fighter, subject to a requirement that the "scale" of the house must be filed with the State Commission, which has the power to revoke the promoter's license. That is far from a monopoly price. We are not dealing with a claim where all promoters charge the same or an agreed price. As to dealings between the defendants and the agencies representing the advertisers or sponsors, there is not the slightest suggestion other than that they dealt at arm's length. (Certainly, the economic power of Gillette Razor Company or Pabst Brewing Company was greater than that of the defendants.) Messrs. Lawrence Lowman of C. B. S., Thomas S. Gallery of N. B. C., Craig Smith of Gillette and Lester A. Malitz, agent for Pabst, testified at the trial and testimony to that effect was not even sought to be elicited from them.

II. AS TO THE RELEVANT MARKET:

The plaintiff's brief confirms the contention in our brief that the relevant market is professional boxing, championship and non-championship, and that the differences in sizes and amounts do not create separate markets.

The plaintiff's brief, as well as certain of the ultimate findings, base the alleged championship market on such terms as "particular and special demand", "special attractiveness and peculiar qualities", "separate and distinct". These are merely words and phrases which the facts do not support (Pl. Br. 16 and 17).

Each specific fact claimed to be a distinguishing factor turns out to be in effect a difference in size of audience or dollar receipts. These quantitative differences exist between different championship fights, between some championship and non-championship fights, and between different non-championship fights.

Non-championship and championship fights may be fair or good or better, and some of the better non-championship fights attract larger audiences and greater gate and television receipts than championship fights.

Championship fights definitely tie in with the weekly television series in adding prestige and interest (R. 139, 373, 397). They thereby contribute to the continuity of that series even when non-championship fights do not appear. (In this connection plaintiff's brief p. 30 inadvertently overstates Finding 83.)

When the championship fight is a part of the weekly series, it is the main part. In other instances non-championship fights are the main part and sometimes draw more than some championship fights do (Pl. Br. p. 5).

There is nothing in the brief—or in the findings—to show that there is a substantial viewer audience for championship fights only. As stated in our brief, there is nothing to contravert the natural assumption that the greater majority, or perhaps all, of those who view championship fights are at times viewers of non-championship fights (R. 373, 378, 397).

The situation is not affected by the fact that the same two boxers may receive more for television in a championship fight than in a non-championship fight. The same situation could exist between two boxers in non-championship fights depending upon the publicity and interest at that particular time.

Plaintiff's brief (p. 35) quotes C. B. S. as being interested in television-radio rights to "good fights" and "championship fights" in particular. This demonstrates that good fights include not only championship fights but other fights. It also demonstrates that the difference between good fights, championship or non-championship, is one of degree and not of kind.

The plaintiff, while seeking to prove its main case, has time after time in its brief relied on the whole professional boxing market and has inferred that the championship market is only

a part thereof. Examples of language and page numbers include:

Page 5—"*professional boxing, including championship boxing*".

Page 9—purpose of I. B. C. (Ill.) is "promoting *professional* boxing contests in Illinois".

Page 10—T. of C. would control "*fights*".

Page 10—Television companies trying to control "*fights*".

Page 10—Defendants joined to conduct "*boxing contests*".

Page 12—Jacobs surrendered his contract "for presentation of *boxing contests*".

Page 12—Jacobs' agreement related to "*professional boxing contests*".

Page 13—T. of C.'s action relates to a "*weekly series of boxing contests*".

Page 13—C. B. S.'s agreement relates to "*professional boxing*".

In none of these instances was there any narrowing of the market to championship boxing. The plaintiff itself considered it as one market in proving its case, and passes indiscriminately from professional boxing to professional championship boxing as suits the purpose of counsel (see, for example, pp. 7, 8, 9 and 26).

Plaintiff's brief adds nothing to the District Court's findings that a separate market exists for championship fights except an assertion that as a matter of law (*United States v. du Pont & Co.*, 351 U. S. 377 (1956) (footnote 23, pp. 395-6)) the market expands and contracts in accordance with the defendants' type of conduct, shrinking whenever the defendants had

specific intent to monopolize. But no case cited in that footnote shaped the market to fit the defendants' conduct. In every case where the relevant market was an issue, it was "first necessary to delimit the market" and then analyze the defendants' conduct within that market. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527 (1948) (a case cited in the *du Pont* footnote).

The plaintiff's concept of a variable market, if adopted, would make a meaningless formality out of the market test and automatically convert section 1 restraints into section 2 conspiracies or attempts to monopolize. The attempt to monopolize and conspiracy cases enjoin defendants from engaging in previously proved efforts to obtain powers which would eventually lead to monopolization. The actual point at which monopolization would be achieved is therefore unimportant. Here, however, the District Court decided that the defendants not only aspired to but actually succeeded in monopolization, and it bottomed its decree on this conclusion. Such a conclusion of necessity required an evaluation of the relevant market.

Plaintiff refers to the *Paramount* case—334 U. S. 131—and draws a parallel between championship fights and "first-run" movies—referring to the first-run field as the "cream" of the exhibition business. The analogy would be correct if one or two moving picture operators had employed one after another several very able actors and actresses who had by reason of their outstanding performance produced films of a first order which were shown with great success in a few of their own theatres and not in thousands of other theatres throughout the country. That is what was done in the boxing area by defendants in this case, and there is nothing in the *Paramount* case that deals with those facts or is inconsistent with our views on the market. Moreover, there was no controversy in that case as to the relevant market.

III. AS TO RELIEF:

The plaintiff's brief filed in support of the District Court's findings of fact gives no substantial reason why relief consisting of: *a*) prohibiting exclusive contracts with boxers (excepting, perhaps, one return bout engagement which, in fact, is for the benefit of the boxer); *b*) prohibiting exclusive use of arenas other than the two owned by the defendants; and *c*) limiting the number of professional championship contests which may be promoted each year, is not sufficient.

Nothing in the brief justifies the harsh and punitive nature of the decree appealed from.

All of the acts of the defendants now urged as violations of law occurred in the period 1949-53—a time when the Bar and many members of the federal court believed that business activities relating to professional sports were not within the prohibition of the antitrust laws. See *Toolson* v. *New York Yankees*, 346 U. S. 356 (1953).

The activities complained of have ceased. There is thus no basis and no need for punitive relief.

The plaintiff's brief concludes with a quotation from the Court (R. 896) to the effect that the extent of defendants' activities requires drastic affirmative action. There is certainly no dispute but that the Court did grant drastic affirmative relief.

A. Discretion

We think plaintiff's brief wholly misconceives the judicial definition of discretion. Discretion and power are not synonymous and it is still good law that the punishment must fit the crime.

In *Hartford-Empire Co.* v. *U. S.*, 324 U. S. 570 (1945), Mr. Justice Roberts stated for the majority that (p. 571) "... it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judg-

ment of a single judge, without review of the relief granted or denied by him." Several years later in *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 89 (1950), the Court asserted that while the formulation of the decree "is peculiarly the responsibility of the trial court":

> ". . . we have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree."

Moreover, the most appropriate answer to the claim of non-reviewability is that the Trial Court itself in several places throughout the discussion on the decree indicated that its findings should be subject to review and perhaps revision by this Court (R. 862, 885, 904, 905, 926). The Trial Court recognized that if the relief ordered was drastic or punitive it "would be reversed" (R. 889-890).

B. Existing Conditions

While, as pointed out in the plaintiff's brief, the District Court conducted lengthy hearings on the decree, yet his decree indicates directly and by omission that as a practical matter he ignored completely the existing conditions. These conditions at the time of the decree were as follows:

(1) The Joe Louis Contracts

The Joe Louis agreements had lapsed.

(2) Exclusive Contracts of Boxers

There were no exclusive contracts with any boxers.

(3) Exclusive Leases of Arenas

The defendants have no lease on the Yankee Stadium. They have no lease on the Polo Grounds.

They have no lease on the St. Nicholas Arena, and, in fact, another promoter has been currently using that arena for a series of televised prizefights (R. 768).

None of the defendants had any interest in Detroit Olympia.

The defendants were not engaged in promoting professional boxing in the St. Louis Arena and it is inferior to the municipally owned Kiel Auditorium therein (R. 266).

In Chicago, the Stadium is only one of four or five arenas in which championship prizefights can and have been produced (R. 686-7, 917).

The defendants have no interest in any arena except the two they respectively own (R. 726-7, 766, 768).

(4) Control of Promotions

A new heavyweight champion—who is still champion—Floyd Patterson, was promoted by those having no connection with the defendants (R. 854-858).

C. The Punitive Relief Ordered

The plaintiff's brief does not alter the fact that divestiture is a harsh and punitive remedy; the Court's own word was drastic (R. 896).

There is nothing to support the statement that in the sale of the stock the full value would be received (Pl. Br. 43). The reverse is more likely correct. It is common knowledge that the true value of a stock can never be obtained with a a large bloc overhanging the market. The time allowance for the sale (Pl. Br. 43) will not alter that fact.

There is no basis in the record for compelling Messrs. Norris and Wirtz to sell their stock in Madison Square Garden. It was not acquired pursuant to the conspiracy. It was not the fruit of illegal activity and, indeed, there is no evidence that the possession of the stock in the Spring of 1949, was used to persuade Madison Square Garden Corporation

to make the agreements with the IBC companies. Messrs. Norris and Wirtz did not have control of the board of directors (Pl. Exs. 16, 17, R. 989-994).

The directors present at the meeting of the Garden Board of Directors on May 24, 1949, at which final action regarding Jacobs and the Tournament of Champions was taken were: James I. Bush, William M. Greve, John D. Hertz, Edward S. Irish, John Reed Kilpatrick, Jansen Noyes, Harold E. Talbott, Sidney J. Weinberg and Edwin L. Weisl (Pl. Exs. 15-18, R. 988-996). Neither Messrs. Norris nor Wirtz attended the meetings of the Executive Committee held April 12, 1949, of the directors held April 26, 1949, of the Executive Committee held May 10, 1949, or of the directors held May 24, 1949.

There is no basis for stating that the trusteeship will impose a "trifling financial burden" (Pl. Br. 43). Unfortunately, lawyers know too well how the expense of trusteeships tends to mount where there are large sums and numerous persons involved.

No reason has been given to show that the dissolution of the IBC companies is not drastic. The word hari-kari referred to in plaintiff's brief (p. 47) originated with the District Court and was stated with disapproval because of its severity. The Court said (R. 650):

> "May I ask that if you say that I should have the two IBCs commit hari kari? I don't know of any decree at any time where a defendant, a corporate defendant, was ordered to proceed to dissolve."

The only case cited by plaintiff (Pl. Br. 47) to give support to the proposition that dissolution is an appropriate remedy here is *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

In that case there were two corporations which the government desired to be dissolved—Durex Corporation, referred to in the opinion as "Durex", and Durex Abrasives Corporation, referred to in the opinion as the "Export Company". Originally,

Judge Wyzanski ordered that joint ownership of Durex by the co-conspirators would have to cease, but refused to order dissolution of the Export Company, stating that "to dissolve the Export Company would be not to prevent a future, or dissipate the consequences of a past, violation of law but to punish an offender".

The order dissolving Durex was rescinded on rehearing, 96 F. Supp. 356 (D. Mass. 1951). The reason for this modification was stated as follows:

> ". . . there is no anti-trust advantage which follows from the dissolution of Durex for it has already been made plain that Minnesota is free to organize another corporation to perform exactly the same functions as would be performed by Durex". (96 F. Supp. 358).

The Garden and Chicago Stadium are not only free to form new corporations, but as a practical matter must do so if they are to promote any boxing at all.

In seeking to justify dissolution the plaintiff's brief (p. 47) says that the dissolution afforded a "simple and convenient alternative to judgment provisions cancelling numerous agreements". This was not a reason given by the Trial Court for his action and such reason does not justify dissolution. Likewise the Trial Court recognized the need for the continued existence of promoting corporations (R. 881-882):

> The Court: I think it is fair to let them both retain it with limitations. I would incorporate such a provision, that nothing in this decree would operate to prevent Madison Square Garden from incorporating a separate subsidiary corporation entirely controlled by it under the name of International Boxing Club of Madison Square Garden, and the same with the Chicago Stadium."

The plaintiff's brief does not deny that the compulsory leasing provision of the decree will impose on the Court at least the ultimate duty of engaging in an operation of an arena,

in fact, in one of its most important activities, to wit, the selection of a boxing attraction as against other applicants, boxing or otherwise. In general this seems to be an undesirable and somewhat impractical activity for a District Court; in addition it involves further expense to be paid by the defendants.

No valid reason has been given why the non-championship fights should be the subject of a decree or why the plaintiff can switch its base back and forth from championship to all professional boxing. No sound reason has been given why any activity with non-championship fights could affect championship fights.

CONCLUSION

It is respectfully submitted that the judgment and decree appealed from should be reversed.

Respectfully submitted,

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